

**D.B.CIVIL SPECIAL APPEAL NO. 74/2004.
IN
S.B.CIVIL MISC. APPEAL NO.1007/1994(DEFECT).
(S.B.CIVIL MISC. RESTORATION APPL. NO.13/2004).**

06.12.2004.

**HON'BLE SHRI RAJESH BALIA, J.
HON'BLE SHRI DINESH MAHESHWARI, J.**

Mr. J.K. Bhaiya, for the appellant.
Mr. L.D. Khatri, for the respondent-Insurance Company.

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BY THE COURT (Per Hon'ble Balia, J.)

This appeal is directed against the order dated 7.4.2004 passed by the learned Single Judge by which the application for restoring S.B. Civil Misc. Appeal No. 1007/1994 (defect) was rejected. The Miscellaneous Appeal has been preferred by the present appellant who was claimant in Motor Accident Claim Petition No. 57/1993 before the Motor Accident Claims Tribunal, Bali. The respondent No.3-Insurance Company had been served. The respondents No. 4 and 5, the driver and owner of Jeep No. RJ 22/C 0143 one of the vehicle involved in the said accident were also served. However, notices issued to the respondents No. 1 and 2, the driver and owner of Bus No. RJ 22/P 0098 were not being served for some time. In these circumstances, on 09.01.2003, an order was made by the learned Single Judge

'that learned counsel prays for six weeks time to find out the fresh address and submit them. Six weeks time is granted, failing which, the appeal will stand dismissed without reference to the Court.'

In pursuance of this order, counsel for the appellant filed notices for respondents No. 1 and 2 on 9.1.2003 i.e. on the very day. However, it appears from the office report that notices were not filed with the latest and fresh address, hence the notices were not found as per order dated 9.1.2003 and ultimately on 1.4.2003 it was recorded by the Deputy Registrar (Judicial) that in view of peremptory order passed on 9.1.2003, the appeal stands dismissed without reference to the Court.

Prior to that, on 25.2.2003 an application under O.5 R. 20 CPC has been moved by the learned counsel for the appellant stating therein that the respondents No. 1 and 2 have not been served despite best efforts for want of fresh address. As per Process Server Report the unserved respondents were reported to be living in Punjab. In these circumstances it was submitted that they may be served by substituted service by publication of the notices in the newspaper circulated in Punjab. This application was not placed before the Court, before the order of dismissal was recorded.

On recording the order of dismissal, the learned counsel for the appellant moved an application under O.41 R. 19 CPC for restoring the Misc. Appeal to its original number by pointing out the reason for being unable to find out the latest postal address of respondents No. 1 and 2 who were residing in Punjab. The said application has since been rejected by the order under appeal which reads as under:-

“Heard learned counsel for the petitioner, and perused the application for restoration. I do not find any sufficient ground to have been made out whereby the peremptory order dt.9.1.2003 could not have been complied. The restoration application is, therefore, dismissed.”

We are of the opinion, after hearing learned counsel for the appellant as well as learned counsel for the Insurance Company who had already put in appearance before the learned Single Judge, that the order under appeal does not take notice of the application under O.5 R. 20 CPC pointing out that the petitioner-appellant was unable to know the present address of respondents No. 1 & 2 and has moved an application for substituted service by publication of notices in newspapers as they are living in Punjab.

In our opinion, when the respondents No.1 and 2 have left their present place of residence and moved to unknown

destination and the appellant was unable to find out their current address and has moved an application under O.5 R.20 CPC for substituted service, the application for restoration ought to have been considered and allowed as there was sufficient cause for the appellant which prevented her from submitting the current address of the respondents No. 1 and 2 and notices have also been filed within time allowed by the Court. We also notice that it also appears that the respondents were served before the M.A.C.T at the address given in appeal and were represented. It was not expected of an appellant to keep track of movement of respondents, nor one is expected to file address which is not in knowledge. In these circumstances, in strict sense it was not even a case of non-compliance. An application under O.5 R. 20 CPC for substituted service was moved on 25.2.2003 which ought to have been placed before the Court for orders.

Be that as it may, when the appellant came to know that process fee and notices filed by her were ignored and appeal has been treated as dismissed by operation of peremptory order, she moved an application for restoration of appeal. The learned Single Judge also did not notice above facts and dismissed the restoration application, which in our opinion, has resulted in failure of justice.

In the facts and circumstances noticed above, the order dated 7.4.2004 cannot sustain itself and accordingly the order under appeal is set aside. Since, the respondents No. 1 and 2 have not been served and respondents No. 4 and 5 have not put in appearance despite service of notice and respondent No.3 (Insurance Company) has put in appearance, we have chosen not to issue notices for the purposes of this appeal.

The matter now be placed before the Single Judge for further proceedings.

No costs.

(DINESH MAHESHWARI), J.

(RAJESH BALIA), J.

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